STATE OF NEW YORK
UNEMPLOYMENT INSURANCE APPEAL BOARD
PO Box 15126
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DECISION OF THE BOARD

Mailed and Filed: JUNE 27, 2023

IN THE MATTER OF:
Appeal Board No. 629184

PRESENT: MICHAEL T. GREASON, MEMBER

The Department of Labor issued the initial determination disqualifying the claimant from receiving benefits, effective March 1, 2022, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by SAFETY BUILDING CLEANING I prior to March 1, 2022 cannot be used toward the establishment of a claim for benefits. The claimant requested a hearing.

By decision filed March 9, 2023 (Appeal Board No. 627575), the Board rescinded the decision of the Administrative Law Judge filed January 18, 2023 and remanded the case to the Hearing Section for a hearing and a decision on the remanded issue. The Administrative Law Judge held a telephone conference hearing at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were

appearances by the claimant and on behalf of the employer. By decision filed April 27, 2023 (), the Administrative Law Judge overruled the initial determination.

The employer appealed the Judge's decision to the Appeal Board.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: The claimant worked for the employer, a janitorial services company, as a porter from August 2021 through February 27, 2022. He worked at a client's location. The employer's code of conduct indicates that everyone is expected to be courteous, polite, and friendly to clients and fellow

employees; should not be disrespectful to clients, use profanity or foul language or engage in any activity that injures the image or reputation of the company; and that such behavior could lead to disciplinary action up to and including termination of employment without prior warning. The employer's policy states that employees are expected to conduct themselves in a manner that will reflect favorably on the employees and the company; that the rule applies whether the employee is on or off the job; and that rude, unprofessional or offensive conduct toward clients or coworkers can be grounds for termination. The claimant acknowledged his receipt of the employee handbook and that he was advised of the employer policies, including the guidelines for appropriate conduct. He had no warnings regarding the use of vulgarity or profanity.

On February 28, 2022, the director of human resources called the claimant around mid-morning or early afternoon to discuss and investigate a complaint she had received from the client regarding suspicion of alcohol use by the claimant. During the call, the claimant was uncooperative and defensive; he became aggravated, raising his voice. He called the director a "b*tch" and told her to s*ck his d*ck. The claimant was discharged for using vulgar, disrespectful, and derogatory language of a sexual nature toward the director of human resources.

OPINION: The credible evidence establishes that the claimant was discharged on February 28, 2022, for using vulgar, disrespectful, and derogatory language of a sexual nature toward the director of human resources. The claimant admittedly used the language toward the director of human resources. The Court has held that an employee's use of vulgar and disrespectful language may constitute disqualifying misconduct (See Matter of Roker, 306 AD2d 737 [3d Dept 2003] and Matter of Cirlincione, 4 AD3d 717 [3d Dept 2004]). The claimant contends that he used such language toward the director after she had told him that she was terminating his employment. However, we credit the testimony of the director of human resources that she advised the claimant that he was discharged after he had directed such language toward her. In this regard, the employer has produced documents establishing that he was contacted by the director on February 28 and that he was discharged due to his language toward her and not due to the allegations from the client. It is significant that the claimant electronically acknowledged his receipt of the employee handbook and that he was advised of the employer policies, including the guidelines for appropriate conduct. The claimant, therefore, knew or should have known that his actions, even while off duty, could result in his discharge. Under these

circumstances, a prior warning is not needed. This case is similar to Appeal Board Nos. 544662 A and 578234. In Appeal Board No. 544662 A, the Board found misconduct where the claimant had one day told the operations manager "f- you, you're not my f-ing boss" and three days later, when meeting to discuss that incident, said "f- you" to the company president. In Appeal Board No. 578234, the claimant's employment ended due to misconduct where the claimant said to the manager "who the f-k are you". While the claimant may have become aggravated because the director was asking him questions about what had happened, his response to the director exceeded the bounds of propriety. Under these circumstances, we conclude that the claimant's actions rise to the level of misconduct and his employment ended under disqualifying conditions.

DECISION: The decision of the Administrative Law Judge is reversed.

The initial determination, disqualifying the claimant from receiving benefits, effective March 1, 2022, on the basis that the claimant lost employment through misconduct in connection with that employment and

holding that the wages paid to the claimant by
prior to March 1, 2022 cannot be used toward the establishment of a claim for benefits, is sustained.

The claimant is denied benefits with respect to the issues decided herein.

MICHAEL T. GREASON, MEMBER